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Part III

Environmental Protection Agency

40 CFR Parts 280 and 281
Underground Storage Tanks—Lender Liability; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 280 and 281

[FRL-4895-3]

RIN 2050-AD67

Underground Storage Tanks—Lender Liability

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing this rule under the Resource Conservation and Recovery Act (RCRA), Subtitle I—Regulation of Underground Storage Tanks, 42 U.S.C. 6901 *et seq.*, to limit the regulatory obligations of persons maintaining indicia of ownership in a petroleum underground storage tank (UST) or UST system primarily to protect a security interest. The rule is proposed in response to petitions received by the Agency in connection with the rulemaking related to lender liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* (See 57 FR 18349).

The Agency is proposing conditions under which certain security interest holders may be exempted from the RCRA Subtitle I corrective action, technical, and financial responsibility regulatory requirements that apply to an UST owner and operator. (See 40 CFR part 280.)

DATES: Written comments on this proposed rule must be submitted on or before August 12, 1994.

ADDRESSES: Written comments on today's proposal should be addressed to the docket clerk at the following address: U.S. Environmental Protection Agency, OUST Docket (5305), 401 M Street, SW., Washington, DC 20460. The Docket is located at 401 M Street, SW., Room 2616. One original and two copies of comments should be sent and identified by regulatory docket reference number UST 3–16. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Docket materials may be reviewed by appointment by calling (202) 260–9720. Copies of docket materials may be made at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For further information about this proposal, contact the RCRA/Superfund Hotline, U.S. Environmental Protection Agency, Washington, DC. 20460, (800) 424–9346 (toll-free) or (703) 412–9810 (local). For the hearing impaired, the number is (300) 553–7672 (toll-free), or (703) 412–3323 (local). For technical information on this proposal, contact Shelley Fudge in the EPA Office of Underground Storage Tanks at (703) 308–8886.

SUPPLEMENTARY INFORMATION: The contents of today's proposed preamble are listed in the following outline:

I. Background

EPA is proposing to establish regulatory criteria specifying which RCRA Subtitle I requirements are applicable to a secured creditor. Section 9003(h)(9) of RCRA exempts from the definition of "owner," for purposes of section 9003(h)—*EPA Response Program for Petroleum,* those persons who, without participating in the management of the UST or UST system, and who are not otherwise engaged in petroleum production, refining, and marketing, maintain indicia of ownership in an UST or UST system primarily to protect a security interest. Those most affected by this "security interest exemption" include private lending institutions or other persons that guarantee loans secured by real estate containing an UST or UST system, or that acquire title to, or other indicia of ownership in, a contaminated UST or UST system.[1] However, the security interest exemption is not limited solely to lending institutions; it potentially applies to any person whose indicia of ownership in an UST or UST system is maintained primarily to protect a security interest.

The RCRA subtitle I security interest exemption not only affects secured creditors but also UST and UST system owners who seek capital through the private lending market. Today's proposed rule will provide a regulatory exemption from corrective action regulatory requirements for those persons who provide secured financing to UST and UST system owners. EPA expects this rule, in conjunction with the statutory exemption in section section 9003(h)(9), to encourage the extension of credit to credit-worthy UST owners. At present, EPA believes that concerns over environmental liability are making a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of USTs. The free flow of credit to UST owners (many of whom are small entities that may rely on secured financing mechanisms for capital) is expected to assist UST owners in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA subtitle I and other environmental requirements. Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under Subtitle I, with concomitant adverse environmental impacts from USTs and UST systems that are out of compliance due to the lack of financing for the UST owner and operator. (For a more detailed discussion, please refer to the *Regulatory Background Document* for this proposed rule, located in the OUST Docket at 401 M Street, SW., room 2616, Washington, DC 20460.)

The Agency is also concerned that if otherwise credit-worthy UST owners and operators are unable to obtain financing to perform leak detection tests, or to upgrade or replace deficient tanks, the market for UST equipment could be adversely affected, thereby limiting the availability and/or affecting

[1] Under the laws of some states, an interest in real property may include an interest in USTs or UST systems located on that property. See *Sunnybrook Realty Co. Inc. v. State of New York, Kesbec, Inc. v. State of New York,* Claim Nos. 32844, 33125, 15 Misc. 2d 739; 182 N.Y.S. 2d 983. Of course, the loan documents may specifically include or exclude USTs as collateral securing the obligation.

the cost of such equipment. In addition, a lack of adequate capital could produce a ripple effect which would cut across other portions of the UST-related industrial sector. Based on letters received from UST equipment manufacturers, EPA believes that this sector has suffered as a direct result of the capital squeeze on UST owners and operators. The Agency is further concerned that many UST equipment manufacturers may find it increasingly difficult to sustain their production of UST equipment. Unnecessary constrictions on the free flow of capital for UST compliance and improvements could force companies to abandon their production of UST equipment or to close altogether, and it may have adverse impacts on the environment by making the investment or development of new UST technological innovations more difficult.

The preamble to this proposed rule is structured as follows: The following section briefly describes the UST program. This section is followed by a discussion of this proposed rule, which includes a description of the various options lenders may exercise both pre- and post-foreclosure with respect to regulatory compliance for a secured UST or UST system. Proposed regulatory text concludes this proposed rule.

II. Description of the UST Regulatory Program

Based on the Agency's study of the banking community's lending practices and discussions with representatives of both lenders and borrowers, EPA believes that the lending community in general is not particularly familiar with the UST statutory scheme and regulatory program. Because UST and UST systems are likely to be used as collateral in securing loans to borrowers, the Agency believes that it is appropriate and useful to briefly describe the UST program in the preamble of this proposed rule. The following discussion is general in nature and is intended to provide a framework for lenders or others to better understand the scope and intent of the program; it is not intended to be a substitute for the regulations themselves.

Under the Hazardous and Solid Waste Amendments of 1984, Congress responded to the increasing threat to groundwater posed by leaking underground storage tanks by adding subtitle I to the Resource Conservation and Recovery Act. Subtitle I required EPA to develop a comprehensive regulatory program for USTs storing petroleum or hazardous substances. Congress directed the Agency to publish regulations that would require owners and operators of new tanks and tanks already in the ground to prevent and detect leaks, cleanup leaks, and demonstrate that they are financially capable of cleaning up leaks and compensating third parties for resulting damages.

EPA's UST regulations, 40 CFR parts 280 and 281, apply to any person who owns or operates an UST or UST system. The term "owner" is defined in the statute generally to mean any person who owns an UST used for the storage, use, or dispensing of substances regulated under subtitle I of RCRA (which includes both petroleum and hazardous substances) (section 9001(3), 42 U.S.C. 6991(3)). Owners are responsible for complying with the "technical requirements," "financial responsibility requirements," and "corrective action requirements" specified in the statute and regulations. These requirements are intended to ensure that USTs are managed and maintained safely, so that they will not leak or otherwise cause harm to human health and the environment. In addition, should a leak occur, the requirements provide that the owner is responsible for addressing the problem.

These same requirements apply to any person who "operates" an UST system. The term "operator" is very broad and means "any person in control of, or having responsibility for, the daily operation of the underground storage tank" (section 9001(4), 42 U.S.C. 6991(4)). As with owners, there may be more than one operator of a tank at a given time. Each owner and operator has obligations under the statute and regulations. In this respect, it is important to understand that a person may have obligations under subtitle I either as an owner or as an operator, or both.

The following subsections describe briefly each of the major components of the UST regulatory program applicable to persons who own or operate USTs and UST systems.

A. UST Technical Standards

The technical standards of 40 CFR part 280 referred to here include: Subpart B—UST systems: Design, Construction, Installation, and Notification (including performance standards for new UST systems, upgrading of existing UST systems, and notification requirements); Subpart C—General Operating Requirements (including spill and overfill control, corrosion protection, reporting and recordkeeping); Subpart D—Release Detection; § 280.50 (reporting of suspected releases) of Subpart E—Release Reporting, Investigation, and Confirmation; and Subpart G—Out of Service UST Systems (including temporary and permanent closure). These regulations impose obligations upon UST owners and operators, separate from the subtitle I corrective action requirements discussed in Section II. B of this preamble.

1. Leak Prevention

Before EPA regulations were issued, most tanks were constructed of bare steel and were not equipped with release prevention or detection features. 40 CFR 280.21 requires UST owners and operators to ensure that their tanks are protected against corrosion and equipped with devices that prevent spills and overfills no later than December 22, 1998. Tanks installed before December 22, 1988 must be replaced or upgraded by fitting them with corrosion protection and spill and overfill prevention devices to bring them up to new-tank standards. USTs installed after December 22, 1988 must be fiberglass-reinforced plastic, corrosion-protected steel, a composite of these materials, or determined by the implementing agency to be no less protective of human health and the environment and must be designed, constructed, and installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory. Piping installed after December 22, 1988 generally must be protected against corrosion in accordance with a national code of practice. All owners and operators must also ensure that releases due to spilling or overfilling do not occur during product transfer and that all steel systems with corrosion protection are maintained, inspected, and tested in accordance with § 280.31.

2. Leak Detection

In addition to meeting the leak prevention requirements, owners and operators of USTs must use a method listed in §§ 280.43 through 280.44 for detecting leaks from portions of both tanks and piping that routinely contain product. Deadlines for compliance with the leak detection requirements have been phased in based on the tank's age: The oldest tanks, which are most likely to leak, had the earliest compliance deadlines.

3. Release Reporting

UST owners and operators must, in accordance with § 280.50, report to the implementing agency within 24 hours, or another reasonable time period specified by the implementing agency,

the discovery of any released regulated UST substances, or any suspected release. Unusual operating conditions or monitoring results indicating a release must also be reported to the implementing agency.

4. Closure

Owners or operators who would like to take tanks out of operation must either temporarily or permanently close them in accordance with 40 CFR part 280, subpart G—Out-of-Service UST Systems and Closure. When UST systems are temporarily closed, owners and operators must continue operation and maintenance of corrosion protection and, unless all USTs have been emptied, release detection. If temporarily closed for three months or more, the UST system's vent lines must be left open and functioning, and all other lines, pumps, manways, and ancillary equipment must be capped and secured. After 12 months, tanks that do not meet either the performance standards for new UST systems or the upgrading requirements (excluding spill and overfill device requirements) must be permanently closed, unless a site assessment is performed by the owner or operator and an extension is obtained from the implementing agency. To close a tank permanently, an owner or operator generally must: Notify the regulatory authority 30 days before closing (or another reasonable time period determined by the implementing agency); determine if the tank has leaked and, if so, take appropriate notification and corrective action; empty and clean the UST; and either remove the UST from the ground or leave it in the ground filled with an inert, solid material.

5. Notification, Reporting, and Recordkeeping

UST owners who bring an UST system into use after May 8, 1986 must notify state or local authorities of the existence of the UST and certify compliance with certain technical and other requirements, as specified in § 280.22. Owners and operators must also notify the implementing agency at least 30 days (or another reasonable time period determined by the implementing agency) prior to the permanent closure of an UST. In addition, owners and operators must keep records of testing results for the cathodic protection system, if one is used; leak detection performance and upkeep; repairs; and site assessment results at permanent closure (which must be kept for at least three years).

B. Corrective Action Requirements

Owners and operators of UST systems containing petroleum or hazardous substances must investigate, confirm, and respond to confirmed releases, as specified in §§ 280.51 through 280.67. These requirements include, where appropriate: Performing a release investigation when a release is suspected or to determine if the UST system is the source of an off-site impact (investigation and confirmation steps include conducting tests to determine if a leak exists in the UST or UST system and conducting a site check if tests indicate that a leak does not exist but contamination is present); notifying the appropriate agencies of the release within a specified period of time; taking immediate action to prevent any further release (such as removing product from the UST system); containing and immediately cleaning up spills or overfills; monitoring and preventing the spread of contamination into the soil and/or groundwater; assembling detailed information about the site and the nature of the release; removing free product to the maximum extent practicable; investigating soil and groundwater contamination; and, in some cases, outlining and implementing a detailed corrective action plan for remediation.

C. Financial Responsibility Requirements

The financial responsibility regulations (40 CFR part 280, subpart H) require that UST owners or operators demonstrate the ability to pay the costs of corrective action and to compensate third parties for injuries or damages resulting from the release of petroleum from USTs. The regulations require all owners or operators of petroleum USTs to maintain an annual aggregate of financial assurance of $1 million or $2 million, depending on the number of USTs owned. Financial assurance options available to owners and operators include: Purchasing commercial environmental impairment liability insurance; demonstrating self-insurance; obtaining guarantees, surety bonds, or letters of credit; placing the required amount into a trust fund administered by a third party; or relying on coverage provided by a state assurance fund.

D. State Program Approval Regulations

Subtitle I of RCRA allows state UST programs approved by EPA to operate in lieu of the federal program. EPA's state program approval regulations under 40 CFR part 281 set standards for state programs to meet.

E. Scope of the UST Program

There are certain types or classes of tanks that are exempt from all or part of subtitle I's requirements. Specifically excluded by statute are: Farm and residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; tanks used for storing heating oil for consumptive use on the premises where stored; tanks stored on or above the floor of underground areas (such as basements or tunnels); septic tanks; systems for collecting stormwater or wastewater; flow-through process tanks; emergency spill and overfill tanks that are expeditiously emptied after use; and tanks holding 110 gallons or less (42 U.S.C. 6991(1)).

In addition, and of particular importance to today's proposal, the statute excludes one type of potential "owner" from the corrective action requirements applicable to owners. Specifically, the statute excludes from the definition of owner any person "who, without participating in the management of an UST, and otherwise not engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the owner's security interest in the tank" (RCRA section 9003(h)(9), 42 U.S.C. 6991b(h)(9)). This statutory provision is intended to exempt from cleanup responsibility a person whose only connection with a tank is as the holder of a security interest; i.e., a bank or other secured creditor who has extended credit to a borrower (commonly the tank's owner) and who has in return secured the loan or other obligation by taking a security interest in the tank. EPA has promulgated regulations governing corrective action under subtitle I. (See 40 CFR part 280, §§ 280.51 through 280.67.) The regulation proposed today addresses the requirements of subtitle I that are applicable to a person who holds a security interest in a tank (a "security holder" or merely "holder") from the time that the person extends the credit up through and including foreclosure and re-sale. As described in this proposed rule, a holder may face obligations either as an owner or as an operator, depending upon the specific activities undertaken by the holder.

III. The UST Security Interest Exemption and Intent of Today's Proposed Rule

A. Overview

The security interest exemption under subtitle I, section 9003(h)(9) of RCRA, 42 U.S.C. 6991b(h)(9), provides:

As used in this subsection, the term "owner" does not include any person who, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the owner's security interest in the tank.

Limited legislative history exists concerning the RCRA subtitle I security interest exemption. No guidance or other indication is available concerning the types of activities that Congress considered to be consistent with the subtitle I security interest exemption, or about the types of activities that Congress considered to be impermissible participation in an UST or UST system's management.

The statutory exemption is limited to liability for corrective action at petroleum-contaminated sites. Since the subtitle I security interest exemption applies only to the corrective action requirements for petroleum—Part 280 Subpart F and portions of subpart E, one interpretation of the statute could hold that the holder is not exempt from complying with other portions of the statute and regulations applicable to an "owner" of a tank. These other parts include 40 CFR part 280, subparts B, C, D, E (§ 280.50 only), and G (hereafter referred to as the "UST technical standards" for purposes of this rule), and Subpart H—Financial Responsibility. However, the statute is silent with respect to a holder's liability for these requirements solely as a consequence of having ownership rights in a tank primarily to protect a security interest. The Agency does not believe that these limited ownership rights rise to the level of full "ownership" sufficient to make the holder an "owner" of the tank, as that term is used in section 9001(3) of RCRA subtitle I. Therefore, EPA is proposing, under its broad rulemaking authority in section 9003, that a holder who meets the criteria specified in this proposed rule (i.e., whose only connection with the tank is as the bona fide holder of a security interest in the UST or UST system) is not subject to the UST technical standards and financial responsibility requirements otherwise applicable to a tank owner. EPA believes that this is both appropriate under the Agency's rulemaking authority and consistent with Congressional intent in providing the section 9003(h)(9) exemption for those persons who provide only financing to owners of a tank. Accordingly, a qualifying holder will not be required to comply with the full panoply of EPA regulations implementing subtitle I that apply to tank owners prior to or following foreclosure, provided that the requirements of today's proposed rule are satisfied.

With respect to a holder's potential to be an "operator" of a tank prior to foreclosure, consistent with the provisions of this proposed rule, the holder typically will not be involved in the day-to-day operations of the tank, and will therefore not incur liability as an "operator."[2] By foreclosing, however, the holder takes affirmative action with respect to the tank and displaces the borrower; therefore, by necessity, the holder has taken "control of . . . [and] responsibility for . . ." the tank, and is therefore a tank operator under the definition at 42 U.S.C. 6991(4). However, under today's proposed rule, a foreclosing holder's responsibility for corrective action as an operator is limited in certain circumstances: In general, a holder's obligations would be limited under the provisions of this rule where the foreclosed-on tank is no longer storing petroleum, or where the holder itself empties the tank within a certain time period. In these circumstances, while a holder is an operator and therefore subject to the UST program's technical requirements and other obligations, a holder may remain exempt from the corrective action requirements and satisfy the technical requirements by exercising one of the options for compliance described in Section III. D. 2 of this preamble. These options allow a holder to satisfy its regulatory obligations as an "operator" by undertaking specified minimally burdensome and environmentally protective actions to secure and protect the UST or UST system. On the other hand, a holder who operates a tank by, for example, storing or dispensing product following foreclosure will be subject to the full range of requirements applicable to any person operating a tank (including corrective action requirements).

In developing today's proposal, EPA examined the potential obligations under subtitle I of government entities that act as conservators or receivers of assets acquired from failed lending and depository institutions, such as the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC). Where a government entity or its designee is acting as a conservator or receiver, EPA interprets the security interest exemption in RCRA subtitle I section 9003(h)(9) to preclude the imposition of the insolvent estate's liabilities against the government entity acting as the conservator or receiver, and considers the liabilities of the institution being administered to be limited to the institution's assets. The situation of a conservator or receiver of a failed or insolvent lending institution is analogous to that of a trustee (particularly a trustee in bankruptcy) that is administering an insolvent's estate and, in accordance with those principles, the insolvent's liabilities are to be satisfied from the estate being administered and not from the assets of the conservator or receiver. Therefore, satisfaction of an estate's debts or liabilities would not reach the general assets of the FDIC, the RTC, those of any other government entity acting in a similar capacity, or those of a private person acting on behalf of the government conservator or receiver.

B. Legal Authority

The legal basis for this proposed rule is the Agency's broad authority to issue regulations interpreting and implementing the provisions of RCRA subtitle I at issue in this proposal. Section 9003(b), 42 U.S.C. 6991b(b) provides EPA with authority to "promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment."[3]

The Agency is proposing to define the regulatory terms under which a secured creditor may, consistent with the statutory exemption, avoid responsibility for corrective action as an owner and operator of an underground storage tank, as well as proposing an exemption from certain financial responsibility requirements. As discussed elsewhere in this preamble (*See* Section III.D), the statutory exemption from corrective action

[2] Of course, a lender which has control of or responsibility for the daily operation of a tank would be an "operator" under section 9001(4), and therefore subject to all requirements applicable to an operator of a tank, including corrective action. Similarly, such acts may also constitute "participation in the management" of the tank, which would void the section 9003(h)(9) exemption and obligate the lender to comply with these same technical, financial, and corrective action requirements as an owner.

[3] The recent decision by the U.S. Court of Appeals for the D.C. Circuit in *Kelley, et al.* v. *EPA*, No. 93–1312 (Feb. 4, 1994) does not apply to or affect the rule the Agency is proposing today. The *Kelley* decision vacated the Agency's rule on lender liability under CERCLA, which interpreted a statutory exemption under CERCLA which is similar to that under RCRA Subtitle I, because "EPA lack[ed] statutory authority to restrict by regulation private rights of action arising under the statute. . ." *Kelley*, slip op. at 3. As noted above, § 9003 expressly confers upon EPA a broad rulemaking authority; to the extent that the grants of rulemaking authority were not sufficiently explicit under CERCLA, such is not the case under RCRA Subtitle I.

liability addresses only *owners* of underground storage tanks, while the statute and EPA's implementing regulations extend liability to both owners and operators. The Agency believes that without promulgating a rule under EPA's broad grant of rulemaking authority applying the protection found in the statutory security interest exemption to operators as well as owners, the statutory exemption may be rendered virtually meaningless, since an owner of an UST is also typically an UST operator. EPA does not believe that Congress, in creating section 9003(h)(9), intended for an otherwise exempt holder of a security interest to nonetheless fall subject to corrective action obligations as an operator. As such, EPA's exercise of its rulemaking authority in the proposed rule is appropriate and, perhaps, needed to fully effectuate the purpose of the statute.

In addition, the Agency has explicit rulemaking authority to, in its discretion, exempt certain classes of owners and operators from corrective action obligations (*i.e.*, holders of security interests as described in this proposal). Section 9003(b) permits the Agency, in promulgating regulations under subtitle I, to make distinctions in its UST regulations between types or classes of tanks, based upon, *inter alia*, "the technical capability of the owners and operators." Because security interest holders are typically not as a general matter engaged in the operation and maintenance of USTs (and thus do not possess the technical capacity of most UST owners and operators), EPA does not believe that requiring them to comply with highly detailed technical requirements is appropriate where requiring them to do so is not necessary for protection of human health and the environment. Furthermore, the Agency believes an exemption from these regulatory requirements is appropriate in the context of this proposed rule, where an exemption will serve, albeit indirectly, to advance the goals of subtitle I by making credit more available and thus aiding in the implementation of tank upgrade requirements.

However, this authority is not open-ended, as section 9003(a) requires EPA to promulgate regulations that are protective of human health and the environment. Without compromising the level of protectiveness established by the UST program, EPA previously relied on its section 9003(b) authority when it excluded a group of owners and operators from RCRA subtitle I requirements in the final Financial Responsibility Rule (53 FR 43322, Oct. 26, 1988). (In relevant part, the preamble to the final Financial Responsibility Rule states: "The Agency does not interpret the Congressional intent of subtitle I to preclude exempting any class of USTs from otherwise applicable requirements when the Agency has determined that such requirements are not necessary to protect human health or the environment.") That rule exempted states and the federal government from the UST financial responsibility requirements since those entities were, as a class, able to satisfy the purpose of the financial responsibility requirements in the absence of regulation.

Similarly, for purposes of this proposal, EPA believes that it is reasonable, in light of the purposes behind this proposal, to exempt a holder from RCRA subtitle I corrective action requirements as an operator if its USTs are empty and secure (as would be required under today's proposal) or if the holder chooses to also engage in environmentally beneficial activities (as discussed in Section III. E of this preamble). Because of the requirements a holder must meet before enjoying this proposed exemption, EPA's UST regulations will satisfy the statutory requirement that they be protective of human health and the environment.

C. Liability of a Holder as an Owner of an Underground Storage Tank or Underground Storage Tank System

The following sections describe the key terms used in this proposed rule. For the most part, these are also terms used in the section 9003(h)(9) security interest exemption. This section specifies the activities that are not "participating in the management" of a tank and which a holder may under today's proposal, engage in consistent with subtitle I regulatory requirements.

1. Petroleum Production, Refining, and Marketing

"Production of petroleum" includes, but is not limited to, activities involved in the production of crude oil or other forms of petroleum, as well as the production of petroleum products from purchased materials, either domestically or abroad. "Refining" includes the processes of cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products. "Marketing" includes the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes. A holder who stores petroleum products in USTs for on-site consumption only, such as to provide heat to an office building or to refuel its own vehicles, is not considered to be engaged in petroleum production, refining, or marketing for the purposes of the UST regulatory program.

2. Indicia of Ownership

EPA is proposing that "indicia of ownership" means ownership or evidence of an ownership interest in a petroleum UST or UST system. EPA is not proposing to limit or qualify type, quality, or quantity of ownership indicia that may be held by a person for the purpose of the regulatory exemption. The nature of the ownership interest may vary according to the type of secured transaction and the nature of the holder's relationship (such as that of a guarantor or surety). Accordingly, indicia of ownership may be evidence of any ownership interest or right to an UST or UST system, such as a security interest, an interest in a security interest, or any other interest in an UST or UST system. For purposes of this proposed rule, examples of such indicia include, but are not limited to, a mortgage, deed of trust, or legal or equitable title obtained pursuant to foreclosure or its equivalents, a surety bond, guarantee of an obligation, or an assignment, lien, pledge, or other right to or form of encumbrance against an UST or UST system. Accordingly, it is not necessary for a person to hold actual title or a security interest in order to maintain some indicia or evidence of ownership in an UST or UST system.

3. Primarily To Protect a Security Interest

EPA is proposing that the term "primarily to protect a security interest" as used in this proposed regulation means a holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation. EPA intends this phrase to require that the ownership interest be maintained primarily for the purpose of, or primarily in connection with, securing payment or performance of a loan or other obligation (a security interest), and not an interest in the UST or UST system held for some other reason.

A security interest may arise pursuant to a variety of statutory or common law financing transactions. While a security interest is ordinarily created by mutual consent, such as a secured transaction within the scope of Article 9 of the Uniform Commercial Code, there are other means by which a security interest may be created, some of which may or may not be the result of a consensual arrangement between the parties to the transaction. In general, a transaction

that gives rise to a security interest within the ambit of this proposed rule is one that provides the holder with recourse against an UST or UST system of the person pledging the security; the purpose of the interest is to secure the repayment of money, the performance of a duty, or of some other obligation. *See generally* J. White & R. Summers, *Handbook on the Uniform Commercial Code* § 22 (2d Ed. 1980); *Restatement of Security* (1941).

As a matter of general law, security interests may arise from transactions in which an interest in an UST or UST system is created or established for the purpose of securing a loan or other obligation, and includes mortgages, deeds of trust, liens, and title held pursuant to lease financing transactions. Security interests may also arise from transactions such as sale-and-leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements or accounts receivable financing agreements, consignments, among others, provided that the transaction creates or establishes an interest in an UST or UST system for the purpose of securing a loan or other obligation.

In contrast, "indicia of ownership" held "primarily to protect [a] security interest" do not include evidence of interests in the nature of an *investment* in the UST or UST system, or an ownership interest held primarily for any reason other than as protection for a security interest. The person holding ownership indicia to protect a security interest may have additional, secondary reasons for maintaining the indicia in addition to protecting a security interest; maintaining indicia for reasons in addition to protecting a security interest may be consistent with the exemption and this proposed rule. However, any such additional reasons must be secondary to protecting a security interest in the secured UST or UST system. EPA recognizes that lending institutions have revenue interests in the loan transactions that create security interests; such revenue interests are not considered to be investment interests, but are considered secured transactions falling within the proposed security interest regulatory exemption.

4. "Holder" of Ownership Indicia

A "holder" as used in this proposed regulation is a person who maintains ownership indicia primarily to protect a security interest, however acquired or held. The term "holder" includes the initial holder (such as the loan originator) and any subsequent holder, such as a successor-in-interest, subsequent purchaser on the secondary market, loan guarantor, surety, or other person who maintains indicia of ownership primarily to protect a security interest. The term also includes any person acting on behalf of or for the benefit of the holder, such as a court-appointed receiver or a holder's agent, employee, or representative.

Finally, it should be noted that lending institutions, which typically hold a large number of security interests, may also act in some trustee, fiduciary, or other capacity with respect to an UST or UST system. However, this rule does not address circumstances in which a lending institution or any person acts as a trustee, or in a non-lending capacity, or has any interest in an UST or UST system other than as provided in this rule. Because this proposed regulation, as well as the exemption in section 9003(h)(9), addresses only persons who maintain a "security interest," any discussion of persons with other interests or involvement in an UST or UST system is beyond the scope of this proposed rule. Of course, a trustee or other fiduciary with respect to an UST or UST system (or any person who independent of the status as trustee or fiduciary) who holds indicia of ownership in the UST or UST system primarily to protect a security interest may fall within this proposed security interest regulatory exemption.

5. Participating in Management

EPA proposes that, as used in this proposed rule, "participation in the management of an UST or UST system" means the actual involvement in the management or control of decisionmaking related to the UST or UST system by the holder. Participation in management does not include the mere capacity or unexercised right or ability to influence UST or UST system operations. This proposal contains a list of activities that is not all-inclusive, but which generally describes activities that are not considered to be evidence that a holder is participating in the management of an UST or UST system. In addition, to address those other activities not specifically listed, a general test of management participation is proposed. The general test specifies that a holder is considered to be participating in management, within the scope of this proposed regulatory exemption, when it exercises decisionmaking control over the borrower's UST or UST system, or where the holder assumes overall management responsibility encompassing decisionmaking authority over the enterprise that includes day-to-day operation of the UST or UST system.

Under the proposed rule, activities that are evidence that a holder is participating in the management of an UST or UST system, and thus acting outside the scope of this proposed regulatory exemption, include: Exercising management control or decisionmaking authority over operational aspects of an UST or UST system, or securing a lease agreement, contractual arrangement, or employee relationship with any other person to manage or operate the UST or UST system. Such activities indicate that a holder is involved in or exercising decisionmaking control of operations of the UST or UST system in which the holder has a security interest.

For purposes of this proposed rule, a holder performing the functions of a plant manager, operations manager, chief operating officer, chief executive officer, and the like, of the facility or business at which the UST is located is considered to be exercising management control or decisionmaking authority over the operational aspects of the UST or UST system and therefore, participating in management, unless the responsibilities for the position specifically exclude all UST responsibilities. Control over the operational aspects of management should not be confused, however, with those activities which constitute administrative or financial management or involvement in non-operational activities. Such activities may be engaged in by a holder in the course of managing a loan portfolio and do not exceed the boundaries of the security interest exemption. Such activities may include providing financial or other assistance, environmental investigations or monitoring of the borrower's business and collateral, engaging in "loan work out" activities, foreclosing on a secured UST or UST system, winding down operations following foreclosure or its equivalents, or divesting itself of the foreclosed-on property containing an UST or UST system. These, as well as other actions related to a holder's financial and administrative obligations, are discussed in more detail in the following section.

a. *General Test of Management Participation.* It is not possible to specifically cover in this proposed rule or any regulation every conceivable situation in which a holder might act, or to make specific provisions for every action that a holder might undertake that might make it ineligible for the protection of the proposed security interest regulatory exemption, voiding

the security interest exemption. A general test or standard of participation in an UST or UST system's management has therefore been formulated to provide a framework within which to assess the consistency of a holder's actions with the limitations of the proposed regulatory exemption.

This proposal's two-prong test or standard of management participation provides that while the borrower is still in possession of an UST or UST system (i.e., pre-foreclosure), a holder participates in the management of an UST or UST system only where the holder either exercises decisionmaking control over the UST or UST system, or where the holder's actions manifest or assume responsibility for the overall management of the UST or UST system's day-to-day operations. The general test adopts a functional approach which focuses on the holder's actual decisionmaking involvement in the operational (as opposed to the financial or administrative) affairs of the borrower's UST or UST system. The first prong looks to whether the holder has exercised decisionmaking control over the borrower's environmental compliance. If so, the holder is "participating in the management" of the UST or UST system as defined in the proposed rule. Similarly, the second prong looks to where the holder is functioning as the overall manager by exercising management at a level encompassing the borrower's environmental obligations, or over all or substantially all of the operational aspects of the borrower's enterprise, regardless of whether decisionmaking control over compliance with the regulations governing the UST or UST system has been explicitly assumed or not. This level of actual involvement in the management of the UST or UST system is sufficient to constitute management participation for purposes of this proposed regulatory exemption.

Under the first prong of the general test, a holder cannot remain within the scope of the exemption if it controls the borrower's environmental compliance activities associated with the UST or UST system. Under the second prong of the general test, the ability to carve out environmental compliance responsibilities from other operational aspects of the borrower's business or enterprise demonstrates that the holder has manifested or assumed operational responsibility at a management level that includes environmental matters, and in doing so is considered to be participating in the UST or UST system's management.

However, management participation does not include the unexercised right to become involved in operational UST or UST system decisionmaking. In other words, if the holder does not exercise its rights to participate in the management of the UST or UST system, it still may qualify for the security interest exemption. Whether the exercise of rights that a holder might have—whether under contract or other agreement (if any) or otherwise, including the enforcement of loan terms and covenants or other rights—rises to the level of participation in the UST or UST system's management is measured by reference to the general test.

b. *Actions that are not participation in management.* Participation in the following activities will not exclusively, in themselves, exceed the bounds of this proposed regulatory exemption: Policing the loan, undertaking financial work out with a borrower where the obligation is in default or in threat of default, undertaking foreclosing and winding up operations (as described later in this proposal), or preparing the UST or UST system for sale or liquidation. In addition, the holder is not considered to be participating in the management of the UST or UST system by monitoring the borrower's business; by requiring or conducting on-site investigations, including site assessments, inspections, and audits, of the environmental condition of the UST or UST system or the borrower's financial condition; by monitoring other aspects of the UST or UST system considered relevant or necessary by the holder; by requiring certification of financial information or compliance with applicable duties, laws, or regulations, or by requiring other similar actions, provided that the holder does not otherwise participate in the management or operation of the UST or UST system, as provided in this proposed regulation. Such oversight and obligations of compliance imposed by the holder are not considered part of the management of an UST or UST system. Although such requirements and oversight may inform and perhaps strongly influence the borrower's management of an UST or UST system, the holder is not considered to be participating in management where the borrower continues to make operational decisions concerning the UST or UST system.

The protected activities of a holder that are specifically identified in this rule are consistent with the language of RCRA section 9003(h)(9) and the overall purpose of subtitle I. Judicial decisions construing the substantially similar language of CERCLA section 101(20)(A) have addressed the issue of the appropriate degree of a holder's involvement at a facility in which it held a security interest (i.e., the standard of "participation in management"). Although the cases articulated the CERCLA standard using different language, these cases generally held that the exemption is abrogated once a holder has divested the borrower or debtor of its management authority prior to foreclosure, such as when the holder becomes involved in the facility's day-to-day operations, where it becomes overly entangled in the affairs of the facility, or where its involvement otherwise affects a facility's hazardous waste practices. See *United States* v. *Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States* v. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985) (participation in financial management insufficient to void the security interest exception to owner liability); *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S.Ct. 752 (1991).

Other cases interpreting the provisions of CERCLA established that a holder's involvement in financially related matters—such as periodic monitoring or inspections of secured property, loan refinancing and restructuring, financial advice, and similar activities—will not void the exemption. See *Guidice* v. *BFG Electroplating and Manufacturing Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States* v. *Nicolet*, 29 Envtl. Rep. Cas. (BNA) 1851 (E.D. Pa. 1989); *United States* v. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985) (participation in financial management insufficient to void the security interest exception to owner liability). The variations in the courts' articulations of the standard, however, left unclear the precise degree of involvement that could be undertaken without voiding the CERCLA exemption. See, e.g., *Fleet Factors Corp.*, 901 F.2d at 1557 (secured creditor may incur CERCLA liability by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste); In *re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) ("there must be some actual management of the facility before a secured creditor will fall outside the exception [found in CERCLA section 101(20)(A)]"). However, more recent cases under CERCLA have articulated a standard of management participation that is substantially similar to that in this proposed rule. See *United States* v. *McLamb*, 5 F. 3d 69 (4th Cir. 1993); *Waterville Industries, Inc.* v. *Finance*

Authority of Maine, 984 F 2d. 549 (1st Cir. 1993).

While the cases listed above describe particular activities and draw a line between the actions of a holder that are and are not evidence of management participation for purposes of CERCLA, there remains uncertainty about the effect of activities commonly or routinely undertaken by a holder in the course of managing a loan secured by an UST or UST system. EPA believes that the uncertainty created for holders examining their potential for liability under CERCLA also exist when holders assess their potential obligations under RCRA subtitle I. Therefore, this proposed rule is intended to specify the compliance obligations for lenders when conducting normal business activities and to define with greater precision the point at which a holder's actions pass from loan oversight and advice to actual UST or UST system management.

The following sections discuss and describe the specific activities of a holder that the proposed rule defines as either activities that indicate the holder's participation in the management of an UST or UST system or those that are *not* instances of participation in the management of an UST or UST system by a person holding indicia of ownership primarily to protect a security interest in the UST or UST system.

It bears repeating, however, that the activities identified in this proposed rule do not specify the only activities that may be undertaken by a holder without losing the protection of the proposed security interest regulatory exemption, and one should not infer that activities not specifically mentioned in this rule are automatically considered evidence of participation in an UST or UST system's management—those must be addressed on a case-by-case basis based on the general test provided in this rule.

(1) *Actions at the inception of the loan or other transaction giving rise to a security interest.* Actions undertaken by a holder prior to the inception of a transaction in which indicia of ownership are held primarily to protect a security interest are irrelevant with respect to the general test of participation in management, and thus are not considered evidence of participation in the management of the UST or UST system. Thus, consultation and negotiation concerning the structure and terms of the loan or other obligation, the payment of interest, the payment period, and specific or general financial or other advice, suggestions, counseling, guidance, or other actions at or prior to the time that indicia of ownership are first held are not considered evidence of participation in the management of the UST or UST system for purposes of this proposed rule. Activities that take place *prior* to holding indicia of ownership are not relevant for determining whether the holder has participated in the management of the UST or UST system *after* the time that the holder acquires indicia of ownership.

In addition to such pre-loan involvement, a holder may determine (whether for risk management or any other business purpose) to undertake or require an environmental investigation (which could include a site assessment, inspection, and/or audit) of an UST or UST system securing the loan or other obligation. Such environmental investigation may be undertaken by the holder, for example, or the holder may require one to be conducted by another party (such as the borrower) as a condition of the loan or other transaction. Neither RCRA Subtitle I nor this proposed rule require that such an environmental investigation be undertaken to qualify for the security interest exemption, and the obligations of a holder seeking to avail itself of the exemption cannot be based on or affected by the holder's not conducting or not requiring an environmental investigation in connection with the security interest. Similarly, a holder is not engaged in management participation solely as a result of undertaking or requiring an environmental investigation, and nothing in this proposed rule should be understood to discourage a holder from undertaking or requiring such an environmental investigation in circumstances deemed appropriate by the holder. Because lender-conducted or -required investigations of a borrower's business or collateral are information-gathering in nature, such activities cannot, alone, be considered to be management participation by a holder.

In the event that a pre-loan environmental investigation of a UST or UST system reveals contamination, the holder may undertake any one of a variety of responses that it deems appropriate: For example, the holder may refuse to extend credit or to follow through with the transaction or instead maintain indicia of ownership in other, non-contaminated property as protection for the security interest. Alternatively, a holder may determine that the risk of default is sufficiently slight (or that the extent of contamination is minimal and does not significantly affect the value of the UST or UST system as collateral) to proceed to extend credit and maintain indicia of ownership in the UST or UST system. Additionally, the holder may require the borrower to clean up the contamination as a condition for extending the loan. Such activities are not considered participation in the UST or UST system's management, and a holder that knowingly takes a security interest in contaminated collateral is not subject to compliance with the RCRA Subtitle I corrective action regulatory program solely on this basis.

(2) *Policing the security interest or loan.* A holder may undertake actions that are consistent with holding ownership indicia primarily to protect a security interest which include, but are not limited to, a requirement that the borrower clean up a release from the UST or UST system which may have occurred prior to or during the life of the loan or security interest (as described in the last section); a requirement of assurance of the borrower's compliance with applicable federal, state, and local environmental or other laws and regulations during the life of the loan or security interest; securing authority or permission for the holder to periodically or regularly monitor or inspect the UST or UST system in which the holder possesses indicia of ownership, or the borrower's business or financial condition, or both; or to comply with legal requirements to which the holder is subject; or other requirements or conditions by which the holder is able to police adequately the loan or security interest, provided that the exercise by the holder of such other loan policing activities are not considered evidence of management participation as provided in the proposed rule's "general test" of management participation.

The authority for the holder to take such actions may be contained in contractual (e.g., loan) documents or other relevant documents specifying requirements for financial, environmental, and other warranties, covenants, and representations or promises from the borrower. While the regulatory exemption in this proposed rule requires that the actions undertaken by a holder in overseeing or managing the loan or other obligation be consistent with those of a person whose indicia of ownership in an UST or UST system is held primarily to protect a security interest, a holder is not expected to be an insurer or guarantor of environmental safety or quality at a secured UST or UST system. The inclusion of environmental warranties and covenants is not considered to be evidence of a holder's acting as an insurer or guarantor, and a finding of

"management participation" cannot be premised solely on the existence of such terms or upon the holder's actions that ensure that the UST or UST system is managed in an environmentally sound manner. Since these actions are consistent with holding indicia of ownership primarily to protect a security interest, they are not considered to be participation in management in this proposed rule.

(3) *Loan work out.* The holder may determine that actions need to be taken with respect to the UST or UST system to safeguard the security interest from loss. These actions may be necessary when, for example, a loan is in default or threat of default, and are commonly referred to as "loan work out" activities. "Loan work out" is largely an undefined term but is generally understood in the financial community to mean those activities undertaken to prevent, mitigate, or cure a default by the obligor or to preserve or prevent the diminution of the value of the security. Loan work out activities are recognized by EPA as a common lender undertaking and, as such, these actions will not take a holder outside of the scope of the security interest exemption provided for in this proposed rule, provided that such actions are consistent with the proposed general test of management participation.

When the holder undertakes loan work out activities, provides financial or other advice, or similar support to a financially distressed borrower, the holder will remain within the scope of the proposed security interest regulatory exemption only so long as the holder does not participate in management as provided by this proposed rule's general test. Loan work out actions that are not evidence of "participation in management" include, but are not limited to: Restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance with regard to the security interest; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(4) *Foreclosure and sale or liquidation.* Foreclosure and possession of property for purposes of sale or liquidation are often the only remedy the holder may have to secure performance of an obligation. The process of foreclosure and sale or liquidation of a foreclosed-on UST or UST system often results in the exclusive possession of the UST or UST system by the holder and may require or result in the holder's taking record title to the UST or UST system under the laws of some states. For purposes of this proposed rule, the term "foreclosure or its equivalents" includes foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to possession or title, or other agreement in settlement of the loan obligation, or any other formal or informal manner by which the holder acquires possession of the borrower's collateral for subsequent disposition in partial or full satisfaction of the underlying obligation. These actions are considered to fall within the scope of the proposed regulatory exemption as necessary incidents to holding ownership indicia primarily to protect a security interest. However, a holder is under the coverage of the proposed rule and is not considered an "owner" of a UST or UST system only so long as the holder's acquisition pursuant to foreclosure is reasonably necessary to ensure satisfaction or performance of the obligation, is temporary in nature, and occurs while the holder is actively seeking to sell or otherwise divest the foreclosed-on UST or UST system.

To meet the requirements of the proposed rule's exemption from regulatory compliance as an "owner" following foreclosure, a holder must be acting consistently with the security interest exemption's requirement that the ownership indicia maintained by the holder continue to be held primarily to protect the security interest. Where a holder's actions indicate that it is not seeking to sell or liquidate the secured assets, the exemption is voided because such actions are akin to holding the asset for investment purposes. This proposed regulation describes circumstances under which a holder may avoid being considered an "owner" of property on which it forecloses for purposes of certain Subtitle I regulations. It is only by complying with the provisions of this proposed rule that the limited ownership rights of a security holder do not rise to the level of full "ownership" sufficient to make the security holder an "owner" of the tank, as that term is used in EPA's UST regulations. The proposed rule first provides a set of general criteria for offering an UST or UST system for sale, and when and under what circumstances an offer of purchase may or may not be rejected. In addition, even though a holder is permitted to use whatever means are appropriate and available to sell or otherwise divest itself of foreclosed-on property, as a measure of certainty this proposed rule contains an objective test that, if followed by a holder, establishes that the holder is meeting the general obligation to divest itself of a foreclosed-on UST or UST system in a reasonably expeditious manner. EPA believes that this aspect of the proposed rule is consistent with the RCRA Subtitle I security interest exemption.

In general, under this proposal, a foreclosing holder must, in order to maintain consistency with the security interest exemption, seek to sell or otherwise divest itself of foreclosed-on property in a reasonably expeditious manner using whatever commercially reasonable means are available or appropriate, taking all facts and circumstances into account. A holder cannot, under the terms of the proposed rule, reject or refuse offers for the property that represent fair consideration for the asset and remain within the proposed regulatory exemption. A holder that outbids or refuses offers from parties offering fair consideration for the property establishes that the property is no longer being held primarily to protect a security interest. The terms of the bid are relevant for this purpose, and a holder is not required to accept offers that would require it to breach duties owed to other holders, the borrower, or other persons with interests in the property that are owed a legal duty. In addition, the term "fair consideration" refers to an all cash offer, which is intended to ensure that this proposed rule would not require a holder to accept a bid that contains unacceptable conditions, such as requirements for indemnification agreements, non-cash offers, "bundled" offers, etc. This proposed provision should not be read to require that a holder may accept only cash offers, however; a holder is always free to accept any offer satisfactory to the holder. The exact requirement that would be imposed by this proposed regulation is that a holder may not reject a cash offer of fair consideration for the foreclosed-on property. If it does, or if it outbids others offering fair consideration, then the holder would, under today's proposal, be considered to be an owner of the UST or UST system in the same manner as any other purchaser.

This proposed rule's provisions defining "fair consideration" and specifying when the foreclosing holder

may reject or outbid offers for the property are formulated to reflect the amount that the holder may bid at the foreclosure sale, or not reject during the foreclosure sale or thereafter, in order to recover on its loan or other obligation. In addition, there may be multiple security interests in a borrower's property held by secured creditors, which the definition of "fair consideration" must account for. Therefore, for a senior creditor, the term "fair consideration" is proposed to mean a cash amount that represents a value equal to or greater than the outstanding obligation owed to the holder (including the fees, penalties, and other charges incurred by the holder in connection with the property). "Fair consideration" is further proposed to indicate that the amount that will recover the holder's "security interest" in the property may vary depending on the seniority of the loan or other obligation that is being foreclosed upon. Specifically, a junior creditor may be required to outbid senior creditors in order to recover the value of its loan or other obligation. The definition of fair consideration therefore distinguishes between what junior or senior creditors may bid or not reject for purposes of maintaining the exemption. In addition, in order to avoid liability under law (for example, to the borrower), the foreclosing holder may be required to seek an amount at the foreclosure sale that is greater than the outstanding obligation owed to the foreclosing holder, or to sell the property in a different manner; therefore, the proposed rule does not require a holder to accept an offer of "fair consideration" if to do so would subject the holder to liability under federal or state law.

In this way the proposed rule's provisions with respect to the sale or disposition of property will not conflict with the manner in which such sales are required to be conducted under general principles of law applicable to the holder and the disposition of the property including the UST. For purposes of this proposed rule, the definition of "fair consideration" is an objective, "bright-line" test to determine whether the foreclosing holder has an investment or other interest in the property that is not within the exemption, or whether the holder's post-foreclosure activities indicate that it continues to maintain its ownership indicia in the property primarily to protect a security interest, and is therefore within the protective ambit of the proposed rule.

While a holder may use whatever means are reasonable and appropriate for marketing foreclosed-on property to establish that it is seeking to divest itself of property in an expeditious manner, this proposed rule also provides a mechanism by which a holder can definitely establish that it continues to hold indicia of ownership primarily to protect a security interest and is not an "owner," for purposes of complying with the UST regulatory program, of foreclosed-on property. This mechanism is intended to act as another "bright line" to provide clear and unambiguous evidence that a holder is not the UST or UST system's "owner" following foreclosure: A holder choosing to avail itself of this bright line test must, within 12 months following the acquisition of marketable title, list the property with a broker, dealer, or agent who deals with the type of property in question, or advertise the property as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the property in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. If the holder satisfies these criteria, the holder is considered to have complied with the requirement in the proposed rule that it is seeking to sell or otherwise divest the property in an expeditious manner.

EPA also recognizes that market conditions, the condition of the property, and other factors may mean that despite reasonable efforts to expeditiously sell or divest foreclosed-on property, the property may not be quickly sold. Therefore, this regulation does not impose a time requirement for the ultimate disposition of foreclosed-on property. Provided that the property is being actively offered for sale by the holder and no offers of fair consideration are ignored, outbid, or rejected, foreclosed-on property may continue to be held by the holder without the holder being considered an "owner" of the UST or UST system for purposes of complying with the UST regulatory program, as detailed in this proposed rule.

Regardless of the manner in which the foreclosing holder chooses to market the property, if at any time after six months following the acquisition of marketable title the holder rejects, or does not act upon within 90 days of receipt of, a written, *bona fide,* firm offer of fair consideration for the property, the holder will lose the protection of the proposed rule. Under this proposal, a "written, *bona fide,* firm offer" is a legally enforceable, commercially reasonable, offer, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. Where a holder outbids, rejects, or fails to act upon an offer of fair consideration, the holder is considered, for the purpose of the proposed regulatory exemption, to be maintaining its indicia of ownership in the property as protection for investment purposes, and not as security for the obligation.

The proposed exemption from regulatory compliance would also permit a foreclosing holder to undertake actions with respect to the UST or UST system to protect or preserve the value of the secured asset. For example, a holder may determine that it needs to take certain actions with respect to an UST or UST system's operations in order to preserve the value of the foreclosed-on assets or to prevent a future release (such as by the removal of an UST or UST system's contents as described below), or to otherwise prepare property for safe public access incident to sale or liquidation of assets. Precisely because a holder in charge of an UST or UST system may need to take affirmative action with respect to the UST or UST system incident to foreclosure and with respect to any petroleum products that are known to be present, the proposal provides that such actions of dominion and control over the UST or UST system are considered necessary components of holding ownership indicia primarily to protect a security interest, provided such actions are undertaken to protect the asset's value and are not undertaken for investment purposes. Therefore, under this proposed rule, such mitigative or preventative measures are considered to be actions that are consistent with holding ownership indicia primarily to protect the security interest in the UST or UST system.

(5) Winding up operations after foreclosure. In addition, in the post-foreclosure context, this proposed rule provides that a holder that forecloses on an UST or UST system with ongoing operations may wind up the UST or UST system's operations without also being considered to be participating in management. Winding up is considered a protected activity by a foreclosing holder because, without such protection, foreclosure would not be possible where practical or commercial necessity dictates that the foreclosing holder undertake such actions. "Winding up" in the post-foreclosure context includes those actions that are necessary to close down an UST or UST

system's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent sale or liquidation. In winding up an UST or UST system, a holder may undertake all necessary security measures or take other actions that protect and preserve an UST or UST system's assets, including steps taken to prevent or minimize the risk of a release or threat of release of the UST or UST system's contents.

D. Liability of a Holder as an Operator of an Underground Storage Tank or Underground Storage Tank System

Although this proposed rule would be promulgated under authority to write regulations governing UST activities, EPA intends that it be consistent with and further the purposes of the statutory security interest exemption found at Section 9003(h)(9). One critical aspect of the RCRA subtitle I statutory security interest exemption is that while it excludes a holder from the definition of "owner" for corrective action purposes, the statute does not explicitly address a holder's responsibilities as an UST or UST system "operator."[4] The absence of explicit language in the statute regarding operators creates a potential problem for holders, since EPA's UST corrective action regulations (as described in Section II. B of this preamble) apply to both owners and operators of underground storage tanks. Thus, although RCRA subtitle I clearly exempts holders from corrective action liability as "owners" of USTs, the statute does not address whether such otherwise exempt persons face correction action liability as "operators" of USTs. Without clear protection from corrective action liability as potential operators of USTs, EPA believes that lenders will continue to be reluctant to make loans to UST-related businesses due to continued uncertainty about their potential liability for corrective action. This regulatory proposal therefore addresses a holder's potential liability for RCRA subtitle I corrective action as an "operator" of an UST or UST system.

1. Pre-Foreclosure Operation

Prior to foreclosure, a holder who is in control of, or has responsibility for, the daily operation of an UST or UST system is subject to the full range of requirements applicable to operators of USTs. In addition, a holder may also forfeit the protection of the proposed regulatory security interest exemption from compliance with the UST regulatory program as an owner if the holder participates in the management of an UST or UST system as defined in this proposal.

However, a holder will not, as a general matter, have control of, or responsibility for, the daily operation of an UST or UST system prior to foreclosure in its capacity as a secured creditor who holds indicia of ownership primarily to protect a security interest. Prior to foreclosure, a holder is permitted to conduct those activities related to its financial and administrative obligations of managing a loan portfolio. The holder in this position will not lose its ability to take advantage of the proposed regulatory exemption exclusively as a result of engaging in these activities. See Section III.C.5 of this preamble for a more complete discussion of this issue.

2. Post-Foreclosure Operation

If a borrower defaults on its loan obligation and the holder, primarily to protect its security interest, forecloses on the borrower's UST or UST system, the holder is faced with the decision to continue or suspend the storage or dispensing of product from the UST. As with activities prior to foreclosure, a holder who operates an UST following foreclosure (in any manner other than placing the UST in temporary or permanent closure as specified in this proposal) would, under the current regulatory scheme, be an "operator" and subject to all subtitle I requirements. If the holder complies with the requirements of this rule for placing a tank into temporary or permanent closure, a holder, although nevertheless an operator, would be exempt from the subtitle I corrective action regulatory requirements otherwise applicable to operators.

The strategies for complying with the UST technical standards described in this proposal include emptying tanks, leaving vent lines open and functioning, capping and securing lines within 15 days after foreclosure, and performing either temporary or permanent closure of the UST or UST system. Conversely, a foreclosing security holder who exercises some other strategy for complying with the subtitle I technical requirements (or who fails to comply) could be an "operator" under the subtitle I regulations and would therefore be subject to the full panoply of subtitle I regulatory obligations applicable to all operators of tanks including the corrective action regulations.

As long as an UST or UST system continues to store product, future releases are possible. Consequently, EPA believes that the best way to ensure that a holder's tanks will not contribute to contamination after the holder has taken possession of the UST or UST system (particularly if the holder is exempted from EPA's corrective action regulations) is to require the holder to empty its tanks of all petroleum product. An UST or UST system is empty—in accordance with § 280.70—when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight, of the total capacity of the UST system, remain in the system. To ensure that the UST system has been adequately secured, vent lines must be left open and functioning, and all other lines, pumps, manways, and ancillary equipment must be capped and secured (§ 280.70). Under today's proposal, holders who engage in these activities within 15 days after foreclosure will be exempted from the corrective action requirements applicable to "operators." This is a reasonable condition on which to base this exemption since the threat of future contamination will have been effectively abated for the temporary period of time that the property remains in foreclosure by emptying the tank and complying with the other requirements of 40 CFR part 280, as described in this proposed rule. Compliance with these requirements will also satisfy the technical requirements applicable to foreclosing holders as "operators" under the rule proposed today.

EPA is proposing that 15 days be allowed to empty the tank, and cap and secure all lines and equipment based on its familiarity with companies that specialize in providing UST technical services and on the Agency's knowledge of the steps required to properly complete these tasks. Based on this, EPA proposes that 15 days is a reasonable and adequate time frame that limits the period of time during which a tank containing petroleum product may be left largely unattended. However, the Agency is interested in receiving comments from any holders who feel that a 15-day time frame would be inadequate for a holder to arrange for the completion of these tasks. EPA requests comments and data about the adequacy of a 15-day time frame and information supporting an alternative time frame. Information supporting EPA's proposed time frame is available

[4] Under RCRA Subtitle I, being an "operator" is not synonymous with "participating in the management" of an UST or UST system. Section 9001(3)—Definitions and Exemptions—defines the term "operator" to mean "any person in control of, or having responsibility for, the daily operation of the UST system." A person may, without being an "operator" of an UST or UST system, be sufficiently involved so as to be participating in the management (as that term is defined elsewhere in this proposal) of an UST or UST system.

from the Agency OUST docket, reference number UST 3–16.

In addition to emptying and securing the UST or UST system, a holder who wishes to take advantage of the proposed exemption from subtitle I corrective action regulatory requirements as an operator must comply with the subtitle I requirements for either temporary or permanent closure. A holder who chooses to permanently close its UST or UST system, must do so in accordance with §§ 280.71 through 280.74, Subpart G—Out of Service UST Systems and Closure. A holder who chooses to temporarily close its tanks is required, throughout the first 12 months following foreclosure, to maintain corrosion protection and report any known or suspected releases from the UST system. In accordance with § 280.70, release detection is not required as long as the UST system is empty.

If, after 12 months in temporary closure status, the holder possesses an UST or UST system that does not meet either the performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21 (excluding the spill and overfill equipment requirements), and the holder has not successfully disposed of the UST or UST system, the holder must either permanently close the UST system in accordance with §§ 280.71 through 280.74 or perform a site assessment in accordance with § 280.72(a) and apply for an extension through the appropriate implementing agency.

A holder will only need to perform a site assessment if it has failed to sell or otherwise divest of its UST or UST system property within 12 months after entering temporary closure and only if the tanks it has acquired have not been upgraded or replaced to meet the requirements of § 280.20 for new UST systems or § 280.21 for upgraded systems. (UST systems that are adequately protected from corrosion and equipped with leak detection devices pose a significantly lower threat to human health and the environment than do substandard tanks.) The site assessment requirement can also be satisfied if one of the external release detection methods allowed in § 280.43(e) or (f) is operating at the end of the 12-month period, and the release detection method operating indicates that no release has occurred. For those who are still in possession of tanks 12 months after foreclosure, many are expected to possess upgraded or replaced tanks since much of the credit that is expected to be extended subsequent to this rule should be used for upgrading or replacing substandard tanks. Under these circumstances, the holder would be allowed to remain in temporary closure indefinitely. Therefore, EPA believes that few situations should call for a site assessment while the holder is in temporary closure. For those cases in which a holder will find it necessary to perform a site assessment and apply for a temporary closure extension, EPA does not believe that such a requirement will pose a significant additional burden upon the holder, since it is increasingly a standard business practice for a site assessment to be conducted upon most transfers of commercial property. (See Guidelines for an Environmental Risk Program, Federal Deposit Insurance Corporation, February 25, 1993.) While in some cases the requirement may oblige a holder to perform a site assessment sooner (within 12 months after foreclosure) rather than later (upon the date of sale or disposition of the UST or UST system), EPA expects that in most cases a site assessment will, in all probability, be performed before the UST or UST system is transferred to a subsequent purchaser.

The purpose of the provision that requires an UST owner and operator to perform a site assessment in order to apply for an extension 12 months after entering temporary closure (if a substandard UST or UST system has not been replaced or upgraded) was to allow a variance mechanism for UST owners to avoid permanent closure of tanks, on a case-by-case basis. The reason for requiring the site assessment before applying for an extension was based on EPA's concerns that prior contamination could have occurred and could continue to spread from a temporarily closed UST system. Although a holder would not be required to comply with EPA's UST corrective action regulations if contamination is discovered (provided, of course, the holder satisfies the requirements of this proposed rule), it would be required to report evidence of the contamination to the implementing agency (as discussed in the following subsection), who can then decide on the appropriate course of action.

Of course, a holder may choose to continue to operate the UST by storing or dispensing product after foreclosure, or otherwise not exercise either of the options described above. The holder may determine that its interests will be best served by forgoing the security interest exemption, continuing operation of the UST system, and perhaps realizing a greater return of capital on the security interest by selling the property with the UST system as a going concern. In such cases, the tank would be regulated in the same manner as a tank operated by any other person, and the holder would be fully responsible as an operator for compliance with RCRA subtitle I regulations, including corrective action, the UST technical standards, and financial responsibility requirements.

EPA believes that the environment is adequately protected where a holder chooses either of the post-foreclosure options described above for complying with the technical requirements of Subtitle I. Where the tank is removed from service and emptied of its contents, the threat of an unknown or undetected leak resulting in environmental contamination is abated; accordingly, the Agency believes it is appropriate to exempt a foreclosing holder from UST corrective action regulatory requirements under these circumstances.

3. Lenders in Foreclosure Upon the Effective Date of the Rule

The Agency recognizes that some lenders may already hold UST properties through foreclosure or its equivalents at the time the final rule is promulgated. Although EPA is primarily concerned about the future availability of capital to UST owners and operators, rather than loans that have already been extended, the Agency recognizes that holders may be concerned about their potential liability associated with current holdings acquired through foreclosure or its equivalents affecting the extension of future UST loans. A holder who possesses an UST property at the time the rule is promulgated may have tanks that still store product. It would be difficult to determine whether or not contamination caused by a release from such tanks had occurred during the time that the holder had possession of the UST property. A holder, therefore, could potentially be held liable as an UST operator if he has possession of a tank at the time the final rule is promulgated.

EPA requests comments on this aspect of today's proposal. We are interested in collecting data that will clarify whether future UST loan decisions would be negatively affected if the security interest exemption is not extended to holders possessing UST properties through foreclosure or its equivalents upon promulgation of this rule. In addition, EPA is interested in comments addressing whether and how an exemption from the UST regulatory requirements could be structured for holders of such tanks. Finally, we are also interested in receiving comments addressing the extent to which such a

regulatory exemption could impact human health and the environment.

4. Release Reporting Requirements Following Foreclosure

Under today's proposal, upon foreclosure, a holder taking advantage of the proposed exemption from corrective action regulations must nevertheless comply with the requirement in § 280.50 that the discovery of any releases from the UST be reported to the implementing agency. Only the reporting requirement must be followed; the holder need not comply with § 280.52, despite the reference to that provision in § 280.50. The release reporting requirement of § 280.50 is part of Subpart E, which details the obligations for reporting known or suspected releases, investigating off-site impacts, confirming that a release has occurred, and cleaning up spills and overfills. While subpart E generally implements Subtitle I's corrective action and site investigation requirements, from which a holder may be excluded under today's proposed rule, § 280.50 has historically been viewed by EPA as part of the UST technical standards.

A holder is responsible, following foreclosure or its equivalents, for reporting to the implementing agency, any discovery of released regulated substances, or any suspected release at an UST site or in the surrounding area. Such reporting is considered necessary to ensure protection of human health and the environment. By informing the implementing agency of a release, the implementing agency can then determine the appropriate response action, if any.

In the absence of today's proposed rule, a holder would have to perform release investigation and confirmation in accordance with §§ 280.51 through 280.53. Under today's proposal, a holder who chooses to take the tank(s) out of service as described in this proposal is required to follow the procedures established in § 280.50 but is not subject to the release investigation and confirmation requirements in §§ 280.51 through 280.53. A holder who elects to keep the tank(s) in operation is obligated to comply with all of the Subpart E requirements, including those related to release investigation and confirmation, and corrective action.

E. Actions Taken to Protect Human Health and the Environment

Because of the special position and role played by bona fide holders, as has been recognized by Congress in creating the statutory exemption from corrective action liability, the Agency believes that it is appropriate to include within the scope of protected UST or UST system activities certain lender actions which protect human health and the environment. EPA believes that there are a number of activities in which a holder may engage after foreclosure which can contribute to the protection of human health and the environment and in which the holder may engage and still meet the terms of the proposed rule's exemption from regulatory requirements. Such activities include: Release response and corrective action for UST systems, permanent or temporary closure of an UST or UST system, tank upgrades or replacements, environmental investigations, maintenance of corrosion protection, and release reporting. The Agency believes that protection of human health and the environment can be advanced by allowing a holder to participate in activities associated with environmental compliance either prior to or following foreclosure on an UST or UST system. Environmental compliance activities are generally considered to be integral to the daily operations of an UST or UST system, and a person who participates in those activities would typically be considered an operator. However, a reasonable holder may also undertake such activities in the course of maintaining its indicia of ownership in the tank to protect its security interest. Therefore, the Agency believes that it is appropriate to propose that environmental compliance activities, if undertaken by a holder, will nevertheless allow the holder to take advantage of the proposed exemption from regulatory requirements. The Agency is not proposing that these activities be required of a holder as a condition for obtaining the security interest exemption as an UST owner, but that holders be able to participate in these activities without losing the protection of the proposed exemption.

Prior to foreclosure, therefore, and where the holder is otherwise permitted,[5] a holder may require the borrower to comply, or itself undertake to ensure compliance, with the subtitle I regulations applicable to the tank owner and operator (typically, the borrower), without being deemed an "operator" under the provisions of this proposed rule. EPA believes that a holder who is ensuring that a tank is operated as specified in 40 CFR part 280 (even if the holder is itself performing the activities authorized or required by part 280) is acting both to preserve the collateral (and therefore acting consistent with its capacity as a security interest holder) and to protect human health and the environment. It is appropriate for a holder to intervene in such circumstances in which human health and the environment are threatened by an UST owner or operator's improper management or operation of its tank(s). However, undertaking activities that bring the tank(s) into compliance (i.e., regulatory compliance actions such as tank testing, leak detection, upgrading, etc.) will not exempt a holder from complying with the UST corrective action regulatory requirements if the holder is otherwise involved in the day-to-day operation of the tank(s). All other acts of operation undertaken by a holder (such as filling the tank(s) with product, selling and/or dispensing tank product, performing overall management functions, etc.) are not shielded activities under this proposed rule because by doing so the holder displaces the borrower as the primary operator of the tank(s).

Furthermore, following foreclosure, where the holder chooses to take advantage of the conditional exemption from the corrective action regulations by emptying and removing the tank from operation, as specified above, the Agency proposes that the holder may—without losing the protection of the proposed rule—undertake cleanup activities consistent with the corrective action requirements of 40 CFR part 280, subpart F at or in connection with the UST or UST system. EPA specifically requests comments on this aspect of today's proposal.

IV. Financial Responsibility Requirements

RCRA section 9003(d), as implemented by EPA at 40 CFR part 280, subpart H—Financial Responsibility, requires owners or operators of petroleum USTs to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental UST releases. As discussed earlier under Section III. A of this proposal, EPA is defining, for purposes of its Subtitle I corrective action and technical requirements, the term "owner" to mean that a holder who maintains ownership rights in an UST or UST system primarily to protect a security interest does not rise to level of a full "owner," and therefore is not subject to compliance with those regulatory requirements. As described earlier, this proposed revision of EPA's corrective action regulatory program is consistent with the Subtitle I statutory security interest exemption. Similarly,

[5] For example, where the lender is permitted pursuant to the loan document or under applicable state laws.

the Agency believes that a holder is not subject to the financial responsibility requirements as an UST owner. The Agency is also proposing to exempt a holder as an UST operator from the financial responsibility requirements.

Before a holder takes possession of an UST or UST system, a holder is not considered an UST operator, for purposes of EPA's technical and financial responsibility regulations, if it is acting merely as a holder and is not in control of the daily operation of the UST or UST system. Therefore, a holder typically is not subject to the UST financial responsibility requirements of 40 CFR part 280, subpart H as an operator prior to foreclosure. EPA is today proposing that a holder be exempted from corrective action as an operator after foreclosure if it ensures that its tanks no longer store petroleum and it complies with the temporary or permanent closure requirements specified in this rule. (See Section III. D. 2 of this preamble). In these situations, where the tanks are empty and pose little threat of release, it would serve no useful purpose to require a holder to demonstrate compliance with the financial responsibility requirements for corrective action. Therefore, the Agency is proposing to exempt holders who satisfy all the other requirements in this proposed rule from demonstrating Subtitle I financial responsibility for UST corrective action.

A holder's responsibility for demonstrating UST financial responsibility for third-party bodily injury and property damage compensation poses a different issue. While RCRA Subtitle I does not include provisions that actually impose third-party liability upon UST owners and operators, it does require UST owners and operators to demonstrate their ability to compensate third parties for bodily injury and property damage caused by accidental releases arising from the operation of an UST or UST system. The Agency believes that a holder who complies with all the conditions set forth in today's proposal should not be required to comply with any of the UST financial responsibility requirements as an owner or operator, including those for both corrective action and third-party liability coverage. EPA has chosen to propose this exemption based on the statutory authority provided in section 9003. The proposed exemption is consistent with the interpretation of that language adopted in the preamble to the UST financial responsibility final rule (53 FR 43323). In that rule, EPA exempted tanks taken out of operation prior to the effective date of the rule from UST financial responsibility compliance. In the preamble to the final rule, EPA recognized that "insurance providers would be extremely reluctant to assure tanks taken out of operation because of the perceived greater uncertainty associated with them" (53 FR 43327). In particular, insurers have indicated that in the case of foreclosed USTs, they would be concerned about vandalism and other threats to USTs at non-operational, unattended gas stations or similar locations with public access. The preamble also states that "even if providers of assurance would assure these tanks, it is unlikely that they would cover leaks which occurred before the effective date of the policy" (53 FR 43327).

A similar situation exists for holders who empty their tanks and enter temporary or permanent closure after foreclosure. EPA has discovered that it is practically impossible to obtain third-party environmental insurance coverage for a new owner of empty tanks. Providers of financial assurance are very reluctant to provide any coverage for tanks that no longer store petroleum product. Further, providers are reluctant to provide coverage for damages that occur after the effective date of the policy for releases that might have occurred prior to the effective date of the policy. Under this proposed rule a holder is required to empty its tanks in order to be exempt from corrective action regulatory requirements. Since providers are unlikely to provide any coverage for empty tanks at non-operational facilities or for releases that occurred prior to foreclosure, and since third-party damages would be extremely unlikely to stem from releases occurring after the holder forecloses on and empties its tanks, the Agency believes it is unnecessary to require third-party liability coverage for such tanks.

RCRA section 9003(c)(6) supports this proposed exemption. That provision emphasizes the connection between the UST financial responsibility requirement and a tank's operational status: "The regulations promulgated pursuant to this section shall include: . . . (6) requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from *operating* an underground storage tank." [emphasis added.] The Agency believes that since a holder must demonstrate that its tanks are empty and that it is complying with the UST temporary or permanent closure requirements in order to avoid corrective action liability as an operator, there should be no need for a holder who meets these requirements to demonstrate financial responsibility for corrective action or third-party damages. By requiring the holder to empty the tank in order to be exempt from corrective action requirements, EPA is ensuring that damages caused by future releases from that tank will be minimized if not avoided altogether. As a result, EPA is proposing that holders who act in accordance with the requirements described in this proposed rule be exempt from all subtitle I financial responsibility requirements.

V. State Program Approval

RCRA subtitle I section 9004, as implemented by 40 CFR part 281, provides states the ability to operate an UST regulatory program in lieu of the federal program if they first submit the program for review and receive approval from EPA. EPA approval of a state program means that the requirements in the state's laws and regulations will be in effect rather than the federal requirements. Program approval ensures that a single set of requirements (the state's) will be enforced in that state, thus eliminating the duplication and confusion that can result from having separate state and federal requirements. EPA considers state program approval to be an integral part of the UST regulatory program.

EPA's approval review focuses primarily on the basic state authorities (laws and regulations) needed to achieve the underlying objectives of the federal regulations covering the UST technical standards, corrective action, and financial responsibility requirements. The UST state program approval process is also based upon a performance-oriented approach. The statutory test for an approvable state program is that it be "no less stringent" than the federal requirements and include as many categories of UST systems (or be as broad in scope) as the federal requirements. EPA reviews the state's specific statutory and regulatory provisions as well as their interpretation by the attorney general of the state.

Today's proposed rule is not intended to present a barrier for states to receive state program approval. A state is not required to have enacted a security interest exemption in order to receive approval of its program from EPA, since failure to have such a provision would merely make the state program broader in scope than the federal one. However, EPA encourages states to adopt statutory and/or regulatory provisions comparable to the final federal UST lender liability rule so that credit-

worthy UST owners and operators will have access to funds to upgrade or replace their tanks.

If a state program includes an UST security interest exemption, EPA will evaluate it against the criteria in § 281.39, as proposed in this notice. These criteria stem from the key components contained in this proposed rule. A state program that exempts a holder from UST corrective action, financial responsibility, and technical requirements as an owner may be approved if: The holder is maintaining indicia of ownership primarily to protect a security interest in a petroleum UST or UST system; the holder does not participate in the management of the UST or UST system; and the holder does not engage in petroleum production, refining, and marketing. In addition, a state program may be approved if it exempts a holder from corrective action and financial responsibility as an operator and if, in addition to the three previous criteria, it requires the holder to demonstrate that its tanks have been emptied and secured, and that it has either permanently or temporarily closed the UST or UST system.

The state's program application should address the issue of UST lender liability in the "Scope" section of its state program description, under § 281.21(a)(3) of the State Program Approval regulations.

VI. Economic Analysis

As discussed elsewhere in this proposal, EPA believes that concerns over environmental liability are making a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of USTs. A more analytical approach to describing the current lending climate and the potential effects associated with today's proposal is through a discussion of lending rates that UST owners are currently faced with, in comparison to those that may prevail after promulgation of a final rule.

In analytical terms, prior to final promulgation of today's proposed rule, the rate that lenders charge now when considering making an UST-related loan can be described as:

$r_{market} - i = r_b + r_e$

where:

r_{market}=Prevailing interest rate on UST-related loans

i=Risk-free rate of return

r_b=Risk premium banks charge for loans to small businesses. (This factor includes the financial risk for a business with certain assets that is unable to repay its loan.)

r_e=Risk premium charged for UST owners. (This factor includes the financial risk that a lender may have to pay for contamination, or uncertainty regarding the true value of collateral, in the event of contamination.)

Due to the current uncertainty regarding a holder's obligations to comply with the UST regulatory requirements, the risk premium "r_e" that banks have to charge in order to be adequately compensated for their risk in an UST-related loan may often be so high that it effectively precludes lenders from making loans at this level. A related barrier to lending is that since all UST owners bear a systematic risk imposed by government regulations, lenders cannot diversify to substantially reduce or eliminate the UST-related risk premium, r_e, by holding a portfolio of UST-related loans with different characteristics and risks. Since most UST owners and operators are small businesses that cannot self finance, they will either forego or delay UST facility improvements. While many UST-related loans are expected to be used for financing tank upgrades or replacements, these loans may also be used to provide additional services at the facility (e.g., an expanded area for food items at a convenience store). If lenders are precluded from making UST-related loans, both environmental protection and economic growth may suffer.

By providing the exemption for holders from UST regulatory requirements contained in this proposed rule and thus reducing the uncertainty associated with making an UST-related loan, the risk premium is expected to be significantly reduced. The interest rate relationship after final promulgation of today's proposed rule can be described as:

r_{market} (post rule)=$i+r_b+r_e$ (post rule)

where:

r_{market} (post rule)=Prevailing interest on UST-related loans after final promulgation of today's proposed rule

r_e (post rule)=Risk premium charged for UST owners after final promulgation of today's proposed rule

Although r_e (post rule) will still exist, it is expected to be significantly less than r_e. The result would be the reduction of the prevailing interest rate on UST-related loans to a level, r_{market} (post rule), that is both adequate to compensate lenders for their perceived risk and at the same time affordable for credit-worthy UST owners.

There are social costs associated with owners' and operators' inability to use the least costly financial mechanism to comply with the existing UST regulations. By reducing the risk premium to a level at which lenders are both willing and able to make UST-related loans, this proposed regulation is expected to increase the ability of UST owners and operators to comply with subtitle I regulations, thereby reducing these social costs. To the extent that loans are made for environmental compliance purposes, social costs would also be reduced by decreasing the number and severity of releases from old USTs that might otherwise occur in the absence of upgrading or replacing tanks.

The Agency is interested in obtaining comments on how this proposed rule might allow UST owners and operators to use less costly financial mechanisms to comply with UST regulations. Specifically, the Agency requests information from lenders on the current interest rate charged for loans when property with one or more USTs is used as collateral. The Agency also requests information from lenders regarding the extent to which credit might have been extended to UST owners and operators in the past had this proposed rule been in effect.

Further information and a more detailed discussion of the costs and benefits associated with today's proposal is contained in the "Regulatory Background Document" for this proposed rule, located in the OUST Docket at 401 M Street, SW.; room 2616; Washington, DC 20460.

VII. Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51,735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to review by the U.S. Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this proposed rule is a "significant regulatory action" because it raises policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, agencies must evaluate the effects of a regulation on small entities. If the rule is likely to have a "significant impact on a substantial number of small entities," then a Regulatory Flexibility Analysis must be performed. Because this proposed rule may actually result in cost savings for small entities that hold security interests in USTs or UST systems, EPA certifies that today's proposed rule would not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

This proposed rule does not contain any new information collection requirements under the provision of the *Paperwork Reduction Act,* 44 USC 3501 *et seq.*

To the extent that this proposed rule discusses any information collection requirements imposed under existing underground storage tank regulations, those requirements have been approved by the OMB under the *Paperwork Reduction Act* and have been assigned control number 2050–0068 (ICR no. 1360).

List of Subjects in 40 CFR Parts 280 and 281

Environmental liability, Financial institutions, Ground water, Lender liability, Oil pollution, Petroleum, State program approval, Underground storage tanks, Water pollution control.

Dated: June 3, 1994.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, chapter I, title I of the Code of Federal Regulations is proposed to be amended as follows:

PART 280—TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (USTs)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, 6991h.

2. Part 280 is proposed to be amended by adding subpart I consisting of §§ 280.200 through 280.250 to read as follows:

Subpart I—Lender Liability

Sec.

Subpart I—Lender Liability

§ 280.200 Definitions.

(a) *UST technical standards,* as used in this subpart, refers to the UST preventative and operating requirements under 40 CFR part 280, subparts B, C, D, G, and § 280.50 of subpart E.

(b) *Petroleum production, refining, and marketing.*—(1) *Petroleum production* means the production of crude oil or other forms of petroleum (as defined in § 280.12) as well as the production of petroleum products from purchased materials.

(2) *Petroleum refining* means the cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products.

(3) *Petroleum marketing* means the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes.

(c) *Indicia of ownership* means evidence of a secured interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure or its equivalents. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.

(d) *A holder* is a person who maintains indicia of ownership (as defined in § 280.200(c)) primarily to protect a security interest (as defined in § 280.200(f)(1)) in a petroleum UST or UST system. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder.

(e) *A borrower, debtor, or obligor* is a person whose UST or UST system is encumbered by a security interest. These terms may be used interchangeably.

(f) *Primarily to protect a security interest* means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation.

(1) *Security interest* means an interest in a petroleum UST or UST system or in the facility or property on which the UST or UST system is located, created, or established for the purpose of securing a loan or other obligation. Security interests include but are not limited to mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in an UST or UST system or in the facility or property on which the UST or UST system is located, for the purpose of securing a loan or other obligation.

(2) *Primarily to protect a security interest,* as used in this subpart, does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership

indicia are held must be as protection for a security interest.

§ 280.210 Participation in management.

The term *participating in the management of an UST or UST system* means that the holder is engaging in acts of petroleum UST or UST system management, as defined herein.

(a) *Actions that are participation in management pre-foreclosure.* Participation in the management of an UST or UST system means, for purposes of this subpart, actual participation in the management or control of decisionmaking related to the UST or UST system by the holder and does not include the mere capacity or ability to influence or the unexercised right to control UST or UST system operations. A holder is participating in management, while the borrower is still in possession of the UST or UST system encumbered by the security interest, only if the holder either:

(1) Exercises decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's UST or UST system management; or

(2) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to:

(i) Environmental compliance; or

(ii) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(b) *Actions that are not participation in management pre-foreclosure.*

(1) *Actions at the inception of the loan or other transaction.* No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of this Subpart. A prospective holder who undertakes or requires an environmental investigation (which could include a site assessment, inspection, and/or audit) of the UST or UST system in which indicia of ownership are to be held or requires a prospective borrower to clean up contamination from the UST or UST system or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation is not by such action considered to be participating in the UST's or UST system's management.

(2) *Loan policing and workout.* Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of this subpart. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and workout activities cover and include all such activities up to foreclosure or its equivalents, exclusive of any activities that constitute participation in management.

(i) *Policing the security interest or loan.* A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not by such actions participate in the management of the UST or UST system as provided in § 280.210(a). Such actions include, but are not limited to, requiring the borrower to clean up contamination from the UST or UST system during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the UST or UST system (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower).

(ii) *Loan work out.* A holder who engages in work out activities prior to foreclosure or its equivalents will remain within the exemption provided that the holder does not by such action participate in the management of the UST or UST system as provided in § 280.210(a). For purposes of this rule, *work out* refers to those actions by which a holder, at any time prior to foreclosure or its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(c) *Foreclosure on an UST or UST system and participation in management activities post-foreclosure—(1) Foreclosure.* Indicia of ownership that are held primarily to protect a security interest include legal or equitable title acquired through or incident to foreclosure or its equivalents. For purposes of this subpart, the term *foreclosure or its equivalents* includes purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations, or promises from the borrower) by which the holder acquires title to or possession of the secured UST or UST system. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, re-lease an UST or UST system held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the UST or UST system in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the UST or UST system, taking all facts and circumstances into consideration, and provided that the holder did not participate in management (as defined in § 280.210(a)) prior to foreclosure or its equivalents. For purposes of establishing that a holder is seeking to sell, re-lease an UST or UST system held pursuant to a lease financing

transaction (whether by a new lease financing transaction or substitution of the lessee), or divest an UST or UST system in a reasonably expeditious manner, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the UST or UST system, or may employ the means specified in § 280.210(c)(2). A holder that outbids, rejects, or fails to act upon a written *bona fide,* firm offer of fair consideration for the UST or UST system, as provided in § 280.210(c)(2), is not considered to hold indicia of ownership primarily to protect a security interest.

(2) *Holding foreclosed property for disposition and liquidation.* A holder, who did not participate in management prior to foreclosure or its equivalents, may sell, re-lease an UST or UST system held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), liquidate, wind up operations, and take measures to preserve, protect, or prepare the secured UST or UST system prior to sale or other disposition. The holder may conduct these activities without voiding the exemption, subject to the requirements of this subpart.

(i) A holder establishes that the ownership indicia maintained following foreclosure or its equivalents continue to be held primarily to protect a security interest by, within 12 months following foreclosure, listing the UST or UST system or the facility or property on which the UST or UST system is located, with a broker, dealer, or agent who deals with the type of property in question, or by advertising the UST or UST system as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the UST or UST system in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the UST or UST system is located. For purposes of this provision, the 12-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, the 12-month period begins to run on the date of foreclosure or its equivalents.

(ii) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the UST or UST system or the facility or property on which the UST or UST system is located establishes by such outbidding, rejection, or failure to act, that the ownership indicia in the secured UST or UST system are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

(A) *Fair consideration,* in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the UST or UST system, is the value of the security interest as defined in this section. The value of the security interest is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of an UST or UST system subject to a lease financing transaction) pursuant to foreclosure or its equivalents, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure or its equivalents), plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure or its equivalents, retention, preserving, protecting, and preparing the UST or UST system prior to sale, re-lease of an UST or UST system held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus environmental investigation and corrective action costs incurred under §§ 280.51 through 280.67; less any amounts received by the holder in connection with any partial disposition of the property and any amounts paid by the borrower subsequent to the acquisition of full title (or possession in the case of an UST or UST system subject to a lease financing transaction) pursuant to foreclosure or its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in the preceding sentence.

(B) *Outbids, rejects, or fails to act upon an offer of fair consideration* means that the holder outbids, rejects, or fails to act upon within 90 days of receipt of a written, *bona fide,* firm offer of fair consideration for the UST or UST system received at any time after six months following foreclosure or its equivalents. A "written, *bona fide,* firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed UST or UST system, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this provision, the six-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, the six-month period begins to run on the date of foreclosure or its equivalents.

§ 280.220 Ownership of an underground storage tank or underground storage tank system.

(a) *Ownership of an UST or UST system for purposes of corrective action.* A holder is not an "owner" of a petroleum UST or UST system for purposes of compliance with corrective action requirements under §§ 280.51 through 280.67, provided the person:

(1) Does not participate in the management of the UST or UST system as defined in § 280.210; and

(2) Does not engage in petroleum production, refining, and marketing.

(b) *Ownership of an UST or UST system for purposes of the UST technical standards.* A holder is not an "owner" of a petroleum UST or UST system for purposes of the UST technical standards provided that the holder:

(1) Does not participate in the management of the UST or UST system as defined in § 280.210; and

(2) Does not engage in petroleum production, refining, and marketing.

§ 280.230 Operating an underground storage tank or underground storage tank system.

(a) *Operating an UST or UST system prior to foreclosure.* A holder, prior to foreclosure or its equivalents, is not an "operator" of a petroleum UST or UST system for purposes of compliance with the corrective action requirements of §§ 280.51 through 280.67 and the UST technical standards, provided the holder is not in control of or does not have responsibility for the daily operation of the UST or UST system.

(b) *Operating an UST or UST system after foreclosure.*

(1) A holder who has not participated in management prior to foreclosure and

who acquires a petroleum UST or UST system through foreclosure or its equivalents is not an "operator" of the UST or UST system for purposes of compliance with the corrective action requirements under §§ 280.51 through 280.67, provided that the holder within 15 days following foreclosure or its equivalents, empties all of its USTs and UST systems so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment.

(2) In addition, the holder must either:

(i) *Permanently close the UST or UST system* in accordance with §§ 280.71 through 280.74, except § 280.72(b); or

(ii) *Temporarily close the UST or UST system* in accordance with the applicable provisions of § 280.70 as follows:

(A) A holder may remain in temporary closure for up to 12 months by:

(*1*) Continuing operation and maintenance of corrosion protection in accordance with § 280.31; and

(*2*) Reporting suspected releases to the implementing agency.

(B) If the UST system is temporarily closed for more than 12 months, the holder must permanently close the UST system if it does not meet either the performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21 except that the spill and overfill equipment requirements do not have to be met. A substandard UST system must be permanently closed in accordance with §§ 280.71 through 280.74, except § 280.72(b), unless the implementing agency provides an extension of the 12-month temporary closure period. The holder must complete a site assessment in accordance with § 280.72(a) before such an extension can be applied for.

(3) A holder who acquires a petroleum UST or UST system through foreclosure or its equivalents is not an "operator" of the UST or UST system for purposes of 40 CFR part 280, subparts B, C, and D of the technical standards for the first 15 days following foreclosure or its equivalents, provided the holder complies with § 280.230(b).

§ 280.240 Actions taken to protect human health and the environment under 40 CFR part 280.

A holder is not considered to be an operator of an UST or UST system or to be participating in the management of an UST or UST system solely on the basis of undertaking actions under 40 CFR part 280, subparts B through H, provided that the holder does not otherwise participate in the management or daily operation of the UST or UST system. Such actions include, but are not limited to, release reporting, release response and corrective action, temporary or permanent closure of an UST or UST system, UST upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in 40 CFR part 280.

§ 280.250 Financial responsibility.

A holder is exempt from the requirement to demonstrate financial responsibility under subpart H—Financial Responsibility, provided the holder:

(a) Does not participate in the management of the UST or UST system as defined in § 280.210;

(b) Does not engage in petroleum production, refining, and marketing as defined in § 280.200(b); and

(c) Complies with the requirements of § 280.230.

PART 281—APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

1. The authority citation for part 281 continues to read as follows:

Authority: Sections 2002, 9004, 9005, 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6912, 6991 (c), (d), (e)).

Subpart C—[Amended]

2. Section 281.39 to added to subpart C to read as follows:

§ 281.39 Lender liability.

(a) A state is not required to have a security interest exemption to obtain or maintain RCRA Subtitle I program approval. If a state enacts a security interest exemption provision, it does not have to be as extensive as the security interest exemption provided for in 40 CFR part 280, subpart I, as defined in §§ 280.200 through 280.250, to obtain or maintain RCRA subtitle I program approval. However, a state's security interest exemption cannot be broader in scope or less stringent than the security interest exemption provided for in 40 CFR part 280, subpart I.

(b) A state program will be considered to be no less stringent than, and as broad in scope as, the federal program provided that the state provision:

(1) Mirrors the security interest exemption provided for in 40 CFR part 280, subpart I; or

(2) Achieves the same effect as provided by the following key criteria:

(i) A holder, meaning a person who maintains indicia of ownership primarily to protect a security interest in a petroleum UST or UST system, who does not participate in the management of the UST or UST system as defined under § 280.210 and who does not engage in petroleum production, refining, and marketing as defined under § 280.200(a) is not:

(A) An "owner" of a petroleum UST or UST system for purposes of compliance with 40 CFR part 280 requirements;

(B) An "operator" of a petroleum UST or UST system for purposes of compliance with 40 CFR part 280 requirements *prior to foreclosure or its equivalents,* provided the holder is not in control of or does not have responsibility for the daily operation of the UST or UST system;

(C) An "operator" of a petroleum UST or UST system for purposes of compliance with 40 CFR part 280 corrective action and financial responsibility requirements *after* foreclosure or its equivalents, provided the holder complies with the requirements of § 280.230(b).

(ii) [Reserved]

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